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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 751

SARAH HUNTER KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 28-33) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 13, 1959 (Pet. App. 28), and petitioner's motion for a rehearing was denied on December 2, 1959 (R. 85). The petition for a writ of certiorari was filed on March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the determination of the Court of Claims that petitioner's property was taken by French authorities under the laws of France and not by the United States is sustained by the evidence.

2. Whether petitioner's claim is barred by the six-year statute of limitations.

STATUTE INVOLVED

The Act of June 25, 1948, ch. 646, 62 Stat. 976, as amended, 28 U.S.C. 2501, provides in part as follows:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * *

STATEMENT

Petitioner, an American citizen, purchased a chateau in France in 1927 (R. 1). For a time she occupied the chateau, but in 1933 she returned to live in the United States and in 1937 removed most of her personal property from the premises (R. 3-4).

In 1939 the chateau was requisitioned by the French Government, and, after France fell, by the German Army (Pltf's Exh. 13). In 1944 the property again was taken by French authorities under the laws of France (Pet. App. 29, 31) and turned over to the American Army. The American forces occupied the chateau from October 17, 1944, to August 25, 1945 (Pet. App. 28; R. 4). Petitioner alleges

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that after the successive occupancies of the French, Germans, and Americans the chateau was badly damaged (R. 4-5).

After the war petitioner filed a claim for $500,000 damages with Headquarters, United States Forces, European Theatre, Claims Liaison Section, APO 887 (R. 5-6). That office promptly referred her claim to the appropriate French official (Pltf's Exh. 1; R. 19). Petitioner thereafter negotiated with the French Government for settlement of her claim and in 1951 entered into an accord with that Government whereby she agreed to accept 16,000,000 French francs in complete satisfaction of her claim for damages to the chateau (Pltf's Exh. 27A, 27B). Petitioner was in fact paid 16,000,000 French francs by the French Government (Pltf's Exhs. 29, 30, 32; R. 11, 20-27, 31-33). A dispute arose, however, as to whether petitioner was entitled to an additional sum to compensate her for the depreciation of the franc.

When no further payments from the French Government were forthcoming, petitioner instituted this action against the United States in the Court of Claims on December 28, 1955 (R. 1). The primary theory of the petition was a claim for just compensation (R. 1-13). The amount claimed was the difference between the actual dollar equivalent of the 16,000,000 French francs petitioner received under her accord with the French Government and the dollar value of 16,000,000 French francs at the rate of exchange existent on August 1, 1945 (R. 10, 13, 14).

The case was referred to a trial commissioner under a limited reference posing two questions bearing on certain theories advanced by petitioner in order to overcome the bar of the statute of limitations (R. 37). During the course of a two-day hearing, 194 pages of testimony were elicited from three witnesses, and 52 exhibits were received into evidence. The trial commissioner found as a fact that the chateau had been taken by French authorities under the laws of France (Pet. App. 29, 31).

On motion by the Government to dismiss, the Court of Claims adopted the trial commissioner's findings and dismissed the petition on the ground that petitioner's property was taken by the French authorities under the laws of France (Pet. App. 29).

ARGUMENT

1. Petitioner's suit for just compensation was dismissed by the Court of Claims on the basis of its determination that her property "was taken by French authorities under the laws of France" (Pet. App. 29), and therefore not by the United States. This finding is, of course, dispositive of petitioner's claim for just compensation under the Fifth Amendment. Although petitioner suggests the contrary (Pet. 2-3), we submit that the record in this case presents only the single question whether the critical determination by the court below is sustained by the evidence. This question clearly does not warrant review by this Court.

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The finding of the Court of Claims, not directly challenged by petitioner, is grounded upon the executive agreement of August 25, 1944, whereby the Provisional Government of the Republic of France agreed, upon request of the Supreme Allied Commander, to "requisition, in accordance with French law * * * facilities * * * which the Supreme Allied Commander determines are necessary for the military needs of his command" (Pet. App. 37). By Supplementary Agreement of the same date (Deft's. Exh. 7; Tr. 84-86), it was stipulated by the Allied Command that it would make its demands in writing upon the appropriate French authority specifying the nature of the facilities requested. The French Government issued its Form No. 101 to be used by Allied Officials in making demands upon French authorities (Pet. App. 32). Shortly thereafter the Army issued Standard Operating Procedure No. 10F, entitled "Field Procurement by United States Forces in France," instructing engineer officers to make their demands upon French authorities for real estate on Form No. 101 (Pet. App. 32-33). There is, as the Court of Claims stated (Pet. App. 33), no evidence of any authority under which United States forces might have acted other than SOP No. 10F and the agreements between the United States and France upon which the SOP was based (Pet. App. 33). And, as found by the Court of Claims (Pet. App. 33), before occupying petitioner's premises on October 17, 1944, the Army formally requested, by means of a Form

No. 101, that French Authorities make petitioner's chateau available for Allied use. The fact that the French Government requisitioned the chateau at the request of the American army authorities does not make the requisitioning any the less the act of the French Government.

Petitioner, unable to cite any evidence that invalidates the finding below, attempts to attack it (Pet. 15-23) by challenging the validity of Standard Operating Procedure No. 10F and the executive agreements between the United States and the French Government upon which it is based. But even if this contention were sound (which we deny), it would not aid petitioner. For, as the Court of Claims found, the taking was the act of the French Government, not of the United States, and the alleged invalidity of SOP No. 10F could not change that fact. Moreover, if SOP No. 10F were invalid, the Army then acted without authority in requesting the French officials to requisition the chateau. In such circumstances, petitioner's only claim would be one sounding in tort and therefore would be beyond the jurisdiction of the Court of Claims. 28 U.S.C. 1491; *Schillinger* v. *United States*, 155 U.S. 163, 168; *Basso* v. *United States*, 239 U.S. 602; *Hooe* v. *United States*, 218 U.S. 322, 335; *United States* v. *North American Co.*, 253 U.S. 330, 333, 334; *Herrera* v. *United States*, 222 U.S. 558, 573; *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 310.

2. Apart from the dispositive finding that the taking of petitioner's chateau was by the French Govern-

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ment, the applicable six-year statute of limitations stands as a jurisdictional bar to the maintenance of this suit no matter on what theory petitioner proceeds. 28 U.S.C. 2501, *supra*, p. 2.

Petitioner's suit was not brought until 1955 on a cause of action which accrued, if at all, not later than 1945. And there is no merit to petitioner's several theories (Pet. 3, 8, 11, 23, 27) whereby she seeks to avoid the bar of limitations. If petitioner's negotiations with the French Government for compensation prior to this action can be likened to the pursuit of an administrative remedy, the limitation period nevertheless continued to run. *Soriano* v. *United States*, 352 U.S. 270; cf. *McMahon* v. *United States*, 342 U.S. 25. Or if, *arguendo*, the French Government processed petitioner's claim as an agent of the United States or if petitioner was led by American Government officials to believe that she must look first to France for redress, the answer is that the statute of limitations is jurisdictional and cannot be waived (*Munro* v. *United States*, 303 U.S. 36; *Finn* v. *United States*, 123 U.S. 227, 232-233), or that the United States is not, in any event, estopped by the improper acts or erroneous representations of its agents. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380; *United States* v. *San Francisco*, 310 U.S. 16, 32; *Wilber National Bank* v. *United States*, 294 U.S. 120; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1960.

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